theless be given a figure for such loss of earning capacity.

I do not think that the learned trial judge was over-generous in giving a figure of $300 per month as the possible earnings which the injured plaintiff could obtain per month from work of mainly manual character. Any additional earning above what he would normally earn in a purely manual employment would be accounted for by the facts noted by the learned trial judge. His previous skills as an Agricultural Assistant had clearly been taken into account as a factor to boost his potential earnings. His Lordship however misread the actuarial table. The amount awarded under this head should be $42,660 from which the appropriate amount of Sarawak Income tax, to be computed by the learned Registrar, should be deducted.

I must emphasize that I have not overlooked what was said by Denning L.J. and Scarman L.J. in *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.*[10] but I note that the facts there are different.

I do not think that we should interfere with the awards of $3,500 for pain and suffering and of $18,000 for loss of amenities. After all the medical specialist was emphatic that the appellant's brain injuries were more severe than those suffered by Koo See Moi. (See [1970] 2 M.L.J. 249).

Bearing in mind the principle enunciated in *Davies* v. *Powell Duffryn Associated Collieries Ltd., supra* I am not satisfied that these awards are of such magnitude as should justify our interference.

As regards the cross-appeal, Mr. Elias concedes that interest is payable under Order 40 rule 11(2).

There respondent urges that interest on the total award of $89,430 should be awarded to the respondent pursuant to Order 40 rule 11(2) of the Rules of the High Court in Borneo, 1963 or alternatively it should be awarded either on the total or on part thereof pursuant to Order 40 rule 11(1) of the same rules.

This court has on previous occasions followed the recommendations by Lord Denning in *Jefford* v. *Gee*[11] and proposes to do so in this appeal. During the course of the appeal Mr. Elias conceded that the amount awarded as special damages *i.e.* $18,330 was fair.

There shall therefore be an award of interest at the rate of 3% per annum on the sum of $18,330 (special damages) from date of accident till judgment, and on the general damages *i.e.* $3,500 for pain and suffering, $18,000 for loss of amenities and $42,660 less tax for loss of earning capacity there should be paid interest at the rate of 6% per annum from date of service of the writ until judgment. The appeal is dismissed with costs, appellant's deposit to be paid to respondent against taxed costs.

Suffian L.P. and **Lee Hun Hoe C.J. (Borneo)** concurred.

Appeal dismissed.

Solicitors: *Ee, Lim & Leong; Chan, Jugah, Wan Ullok & Co.*

KALIMUTHU v. S. KANDIAH

[F.C. (Gill C.J. (Malaya), Ali and Wan Suleiman F.JJ.)
August 26, 1976]
[Kuala Lumpur — Federal Court Civil Appeal No. 176 of 1975]

Landlord and Tenant — Licensee — Permission given to build house on land — Conditional agreement for sale of land to owner of house — Subsequent sale of land without notice of any equitable rights — Notice to quit given by one of several co-proprietors — Civil Law Act, 1956, s. 28(2).

In this case the respondent's father had been given permission by the then owner of a piece of land to build on a portion of the land and to occupy it subject to payment of ground rent. Subsequently one of the sons of the owner agreed to sell the land to the respondent's father subject to his obtaining letters of administration. On the death of his father the respondent went to live in the house. The appellant subsequently claimed to have purchased the land from the son of the owner and gave notice to quit to the respondent. She then brought an action in the Sessions Court to recover possession. The learned President of the Sessions Court gave judgment for the appellant but an appeal by the respondent to the High Court was allowed, the learned trial judge holding that on the pleadings it had not been shown that the respondent had become a trespasser. The appellant appealed to the Federal Court.

Held: (1) the learned judge in the High Court was not correct in saying that no cause of action had arisen;

(2) on the facts of this case, the respondent's father was only a licensee when the house on the land was originally built and this contractual licence was terminated when he died;

(3) even assuming that the respondent's father acquired some sort of equity under the agreement with the son of the deceased owner, the appellant as purchaser without notice of the equity was not bound by it;

(4) in the circumstances the order for vacant possession should be restored.

Cases referred to:-

(1) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 170.
(2) *Hodgkins & Anor.* v. *Hickson* (1878) 39 L.T. 644.
(3) *Doe d. James Aslin* v. *Summersett* (1830) 1 B. Ad. 136; 109 E.R. 738.
(4) *Errington* v. *Errington and Woods* [1952] 1 K.B. 290, 296.
(5) *Thomas* v. *Sorrell* (1673) Vang. 351; [1558-1793] All E.R. Rep. 107.
(6) *Doe* v. *Chamberlaine* (1839) 5 M. & W. 14, 16.
(7) *Lynes* v. *Snaith* [1899] 1 Q.B. 486.
(8) *Peakin* v. *Peakin* [1895] 2 I.R. 359.
(9) *Howard* v. *Shaw* (1841) 8 M. & W. 118

FEDERAL COURT.

D.P. Vijendran for the appellants.

R.R. Chelliah for the respondents

Gill C.J. (Malaya): This appeal arises from an action in the Sessions Court at Kuala Lumpur between the appellant, Kalimuthu alias Papa d/o Marimuthu, as plaintiff and the respondent, S. Kandiah, as defendant. The plaintiff's claim against the defendant was for recovery of vacant possession of house known as No. 36A-2 Jalan Langgok, Bukit Setapak, Kuala Lumpur.

The house in question was built in 1954 or 1955 by the defendant's father, M. Subramaniam, at his own expense on a portion of the land held under Certificate of Title No. 4284 for Lot 2 section 6, Setapak, Kuala Lumpur with the consent and approval of one Maros bin Malim Suleiman who was the then owner of the land, apparently on the understanding that Subramaniam was to pay Maros a monthly sum of $28 by way of ground rent and assessment. Maros

died in or about the year 1956, whereupon Subramaniam continued to pay ground rent and assessment to Ahmad bin Maros, a son and one of the next-of-kin of Maros.

By an agreement dated February 14, Ahmad, as one of the beneficiaries of his father's estate, agreed to sell to Subramaniam for $3,700 the portion of the land, measuring 45 feet by 50 feet, on which the house stands, a sum of $1,850 having been paid to him on the signing of the agreement. The terms and conditions of the agreement were that, on letters of administration of his father's estate being granted to him and upon payment to him of the balance purchase price of $1,850 Ahmad was to deliver to Subramaniam a valid and registrable transfer in respect of the land, and that in the event of his being unable to transfer the land or the land being requisitioned by the Government the sum of $1,850 advanced under the agreement was to become repayable on demand.

Subramaniam died intestate on February 17, 1962, and a grant of Letters of Administration of his estate was issued by the High Court at Kuala Lumpur to the defendant as the natural and lawful son and next-of-kin of the said intestate. The defendant had moved into the house as soon as his father died in 1962 and he has lived there ever since. Neither his father nor he took any steps to obtain specific performance of the agreement dated February 14, 1958 against Ahmad.

Ahmad presumably obtained Letters of Administration to his father's estate because an undivided 4/5th share in C.T. 4284 was transmitted to him as representative. The remaining 1/5th share belonged to someone else. Various transfers of the land were then made to the plaintiff, the first of such transfers being on July 24, 1961 and the last on March 16, 1973 when the plaintiff became the sole registered proprietor of the whole land.

On December 30, 1964 the plaintiff wrote a letter to the defendant informing him that she had purchased the land from Ahmad some years back and asking him to pay her as from January 1, 1965 the amounts of assessment and rental which he had been paying to Ahmad. It is clear, however, that at that stage what the plaintiff had was an undivided share in the land, possibly Ahmad's share. On February 18, 1965 the defendant's solicitors wrote to the plaintiff asking her to let them know the date on which she had purchased the land from Ahmad, the amount of assessment and the area of land for which their client was obliged to pay, and what rental their client was being asked to pay because no such sum was paid by him before to her predecessor. On January 22, 1965 the plaintiff's solicitor wrote to the defendant's solicitors to say that the request was for the payment of only the ground rent of $28 per month which their client had been paying to Ahmad prior to 1965.

On February 27, 1965 the defendant's solicitors wrote to the plaintiff's solicitors to ask whether the plaintiff had any authority from the other co-owners to collect the rent. On March 1, 1965 the plaintiff's solicitor wrote to the defendant's solicitors as follows:

"I am in receipt of your letter of the 27th ultimo and have been instructed that rent had all along been collected by the previous owner from your client without any objection by the other co-owners. My client is merely continuing an existing arrangement whereby my client is entitled to collect the said rent. I am instructed to add that my client had, since purchase, been paying the assessment on the whole of the property for which receipts can be produced for inspection, if necessary.

My client further states that she undertakes to idemnify your client in the event of any claim by the other co-owners as to their respective shares of the rent."

To that letter defendant's solicitors replied to the plaintiff's solicitor on March 3, 1965 stating:

"Our client has received no communication whatsover from Ahmad bin Marcs respecting the transfer of his undivided share to your client. As a matter of fact, which your client is well aware, by an agreement in writing dated the 14th of February, 1958, Ahmad bin Maros had agreed to sell his undivided share in the said land to our client's father, Mr. N. Subramaniam.

Mr. N. Subramaniam has since died and Letters of Administration have been granted to our client.

If Ahmad bin Maros has sold the said share to your client, our client is contemplating taking an action against Ahmad bin Maros for the breach of agreements etc.

Under the abovementioned circumstances our client intends sorting out the above matter before taking a definite decision as to the making of any payment to your client."

On March 10, 1965 the plaintiff's solicitor wrote to the defendant's solicitors as follows: —

"With reference to your letter of the 3rd instant, I have been instructed to write as follows: —

1. It is quite surprising that your client should bring, for the first time, the question of an Agreement between Ahmad bin Maros and your client's father N. Subramaniam. Even if there was such an agreement, my client is unable to see how it can affect his position as the registered co-owner and landlord of the premises. It is suggested that any contemplated action against Ahmad bin Maros has no relevance to my client's claim for rent.
2. My client has given reasonable time for payment of the rent lawfully due to him in the circumstances explained in my letter of the 1st instant and is not prepared to give further time. Please take note that if the rent is not received by Saturday the 13th March, 1965, my client will take appropriate action without any further intimation."

Finally on May 12, 1965 the plaintiff's solicitor sent to the defendant a notice to quit, but no further action was taken until November 16, 1973 when the plaintiff commenced proceedings in the Sessions Court for recovery of vacant possession of the premises.

In her statement of claim the plaintiff affirmed her title to the land and said that on August 22, 1973 a notice to quit and deliver vacant possession of the premises was given to the defendant and he had refused to comply with it. She further said that the defendant was in unlawful occupation of the said premises.

By his statement of defence the defendant admitted receiving the notice to quit but denied that the plaintiff was entitled to possession. He averred that he was occupying the said premises as the administrator and personal representative of his late father and that a *bona fide* question of title was involved, as by the agreement dated February 14, 1958 his father had agreed to purchase that portion of the land on which the premises were erected and paid part of the purchase price. He further averred that if the plaintiff had purchased the said land she had done so with full knowledge that his father's estate was the beneficial owner of the said premises.

The issues before the trial court were whether the plaintiff had title to the land and, if so, whether the defendant had any right to occupy the said land. When the case came up for hearing counsel for the defendant raised a preliminary objection that the court had no jurisdiction to hear and determine the case as a *bona fide* question of title had been pleaded in the statement of defence. The learned President of the Sessions Court, however, ruled that no *bona fide* question of title had arisen which precluded her from hearing and determining the action, and postponed the hearing of the action on its merits to a later date.

At the trial of the action the evidence of the plaintiff was that she bought the land from Ahmad bin Maros, the son and administrator of the estate of the original owner Maros bin Malim Sulaiman. She further said that before that date she was one of the many co-owners of the land and that it was only after separate titles were issued on June 25, 1973 that she brought the present action. She went on to testify that she knew in 1964 that the defendant had been in occupation of the premises and had paid rent to Ahmad bin Maros.

The defendant's evidence at the trial was that his father built the house on the land with the approval of Maros, that after Maros died his father bought the land from Ahmad under an agreement dated February 14, 1958 (Exhibit D 5) and that up to his death on February 17, 1962 his father paid rent and assessment first to Maros and later to Ahmad.

It would seem clear that in defending the plaintiff's action the defendant relied solely on the right to the land alleged to have been acquired by his father under the sale agreement and by virtue of his being the administrator of his father's estate. Counsel for the defendant submitted that the defendant had an equitable right which entitled him to some form of compensation should the action be decided against him.

As regards the agreement relied on by the defendant, the learned President found that it was not an absolute sale of land as it was made subject to certain terms and conditions. In this connection she pointed out that, at the time of executing the agreement, Ahmad had no title to the land in question and that the subject matter had since been legally transferred to a third party, a fact which was in no way disputed by the defendant. She then referred to the fact that the defendant's father in his lifetime had not taken any steps to have the land transferred to himself. She further expressed the view that doubts seemed to shroud the very circumstances leading to the execution of the agreement as the defendant had not been telling the truth in certain respects.

The conclusions at which the learned President arrived were (a) that whatever rights the defendant had acquired under the agreement D5 were only enforceable by him against Ahmad personally and not against any third person, and (b) that since the defendant was neither the legal owner of the land nor a tenant of the plaintiff, his occupation of the premises could only be described as that of a trespasser. Accordingly, she gave judgment for the plaintiff, making an order that the defendant do forthwith deliver vacant possession of the premises to the plaintiff and pay the plaintiff damages at the rate of $120 per month, being the amount which was agreed to both by the plaintiff and the defendant as being a reasonable monthly rental of the premises, from August 1973 to date of delivery of possession.

From that judgment of the Sessions Court the defendant appealed to the High Court. Chang Min Tat J. allowed the appeal. Hence the appeal by the plaintiff to this court.

At the hearing of the defendant's appeal in the High Court the learned President's decision as to there being no *bona fide* question of title being involved was not challenged. The only point taken was in relation to the question of the defendant's equitable right to remain in possession. In dealing with that question the learned appeal judge had no doubt that up to 1958 there was no equity that could assist the defendant. In this connection his Lordship referred to the second limb of the rule stated by Lord Kingsdown in *Ramsden* v. *Dyson*.[1]

His Lordship then went to observe that after the purchase agreement and the expenditure of money an equity could possibly arise under the first limb of the same rule, but that in his view it was not necessary to decide that issue, as the case could be and should be decided on the question whether the respondent (plaintiff) could proceed against the appellant (defendant) as a trespasser. On this question the learned judge had this to say in his grounds of judgment:

"There can be no doubt that initially the occupation of the appellant was entirely lawful. He was treated so by the respondent herself when she demanded ground rents. The statement of claim is entirely silent upon a single fact or any set of facts which could and did convert the lawful occupation into a trespass. It did not rely even if it could (on this I do not express an opinion) on the notice of termination of May 12, 1965. In other words, no cause of action has arisen."

For the reasons stated above the learned judge allowed the appeal and set aside the judgment of the court below.

The grounds on which this appeal has been brought to this court, as set out in the memorandum of appeal, are that the learned judge (1) misdirected himself as to the pleadings herein and the issues that arose before the learned President in the first instance, (2) failed to appreciate the burden of proof that rested on the respondent as to his being in unlawful occupation of the said premises, (3) misdirected himself in holding that the appeal before him could be decided on his incorrect holding that "the statement of claim is entirely silent upon a single fact which could and did convert the lawful occupation into a trespass", (4) erred in law in holding that "no cause of action had arisen", and (5) failed to give due or any weight to the fact that the respondent, on his own admission, had been occupying the premises without rent and/or authority for a period of eight years from May 1965 to August 22, 1973.

At the hearing of the appeal before us counsel for the appellant delivered written submissions. As regards the learned judge's statement that there are no facts in the statement of claim to show how the

original lawful occupation became unlawful, he submitted that there was no necessity for the statement of claim to contain such facts as it need not show how the defendant came into possession or deal with the title alleged. For this proposition he relied on *Hodgins & Anor.* v. *Hickson*[2] in which it was held that the statement of claim, having shown a good title in the plaintiff to the land sued for against all the world, and having alleged that the defendant was in possession, was sufficient.

It is to be observed that the statement of claim in this case affirmed the title of the plaintiff to the land. It further stated that the defendant was in unlawful occupation of the land. It went on to say that a notice to quit and deliver vacant possession of the premises was given to the respondent on April 22, 1973, with which he refused to comply. The defendant admitted receiving such notice in paragraph 3 of his statement of defence. The issues at the trial in the Sessions Court were thus clear, and the trial proceeded on the basis of those issues. At the hearing in the Sessions Court the defendant was in no way embarrassed or prejudiced by the plaintiff's pleadings. Indeed no such point was taken. In my judgment, therefore, with all respect to the learned judge in the court below, it would not be correct to say that no cause of action has arisen so as to preclude this court from dealing with this appeal on the substantial merits of the case.

I am also of the opinion that, apart from her notice of August 22, 1973, the appellant is entitled to rely on her notice of May 12, 1965. She was then one of the co-proprietors of the land. Co-proprietorship under our land law is like a joint tenancy under the English law. It was held in *Doe d. James Aslin* v. *Summersett*[3] that a notice to quit, signed by one of several joint tenants, on behalf of the others, is sufficient to determine a tenancy from year to year, as to all. It is true that in her notice the appellant did not specifically say that she was giving her notice on behalf of herself and the other co-proprietors, but her solicitor's letter to the respondent's solicitors dated March 1, 1965 had stated that she had been paying assessment on the whole of the property and that she undertook to idemnify the respondent in the event of any claim by the other co-owners as to their respective shares of the rent.

The problem in this appeal is to decide what, upon the apparently simple facts of the case, was the true legal relationship between the parties when the house in question was originally built. In other words, did the respondent's father acquire any tenancy rights over the land or was his position that of a licensee? In this connection *Hill and Redman's* Law of Landlord and Tenant (15th Edition) at page 17 says:

"In deciding whether a grant amounts to a lease, or is only a licence, regard must be had to the substance rather than the form of the agreement, for the relationship between the parties is determined by the law and not by the label which they choose to put on it. It has been said that the law will not impute an intention to enter into the legal relation of landlord and tenant where circumstances and conduct negative that intention; but the fact that the agreement contains a clause that no tenancy is to be created will not, of itself, preclude the instrument from being a lease. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is *prima facie* a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and under the control of the owner, it is a licence. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession. On the other hand, the employment of words appropriate to a lease such as "rent" or "rental" will not prevent the grant from being a mere licence if from the whole document it appears that the possession of the property is to be retained by the grantor. In order that a licence may give an exclusive right to the benefit conferred thereby, it must either be expressed to be exclusive in the grant, or it must be possible to infer from the language of the grant a clear intention to that effect."

In the present case there is no written agreement so that there is no evidence as to the terms and conditions on which the respondent's father was allowed to build the house on the land, apart from the fact that he had to pay ground rent and assessment. On the evidence produced it would seem clear that all that was intended was that he should have a personal privilege, with no interest in the land. What he had was clearly a permissive occupation short of a tenancy, but with a contractual right to remain on the land so long as he paid the ground rent and assessment. In other words, he was a contractual licensee. There is no evidence that such contractual licence was for an indefinite period. At its highest, it could be for the respondent's father's lifetime, but in the absence of any evidence as to its duration it is impossible to say that such licence was irrevocable. *Hill and Redman's* Law of England and Tenant (15th Edition) at page 23 says this on the subject:

"It is possible to give a tentative summary of the present law on the revocation of contractual licences:— (1) It is a matter of construction of the contract to determine whether or when the licence is revocable. (2) If the licence is revoked in breach of contract in all cases the licensee has a remedy in damages for breach of contract. If the licence is revoked in breach of contract, and it is a specifically enforceable contract, the purported revocation is without effect and the licensee may remain without becoming a trespasser. If the licence is revoked in breach of contract, and it is not a specifically enforceable contract, probably the revocation is valid and the licensee, if he does not leave within a reasonable time, becomes a trespasser. Whether a notice determining a licence revokes the licence immediately on service, or only from the expiration of some period therafter is likewise a question of construction, but in any case there is a supervening rule of law that the licensee is, in the absence of express contract, allowed what is in the circumstances of the case a reasonable time to enable him to remove himself and his possessions from the subject-matter of the licence. There is thus no necessity to specify any time for removal in the licence, and if an unreasonably short time is specified, the licensee will still be allowed what is in fact reasonable. In the absence of any express or implied stipulation, he cannot be compelled to remove buildings erected under the licence; and, if the revocation of the licence is a breach of a contract, he can recover damages for the breach."

The respondent's case, as argued before us by his learned counsel, is that apart from the tenancy rights, the respondent has an equitable right to remain in possession of the premises by virtue of the fact that he is the administrator of his father's estate, the father having built the house with the consent and approval of Maros upon the faith and expectation that he would have a right to remain on the land, a faith and expectation which were further enhanced

by Maros's son Ahmad by entering into an agreement which led the respondent's father to believe that he had an absolute estate in the property.

As I have already indicated, I find myself unable to agree that the respondent's father had any tenancy rights up to the date of the agreement in 1958. As was pointed out by the learned judge in the court below, up to the date of the agreement in 1958 there was no equity that could assist the defendant. The question then is, did that agreement create a tenancy in favour of the respondent's father? I do not think so. In *Errington* v. *Errington and Woods*[4] Lord Denning said:

"The classic definition of a licence was propounded by Vaughan C.J. in the seventeenth century in *Thomas* v. *Sorrell*[5]: 'A dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful.' The difference between a tenancy and a licence is, therefore, that, in a tenancy, an interest passes in the land, whereas in a licence, it does not. In distinguishing between them, a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, *albeit* only a tenant at will (see *Doe* v. *Chamberlaine*[6] and *Lynes* v. *Snaith*[7]) whereas if he had not exclusive possession he was only a licensee: *Peakin* v. *Peakin*.[8] This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is *Howard* v. *Shaw*[9] where a person was let into exclusive possession under a contract for purchase. Alderson B. said that he was a tenant at will; and Parke B., with some difficulty, agreed with him, but Lord Abinger said that *'while the defendant occupied under a valid contract for the sale of the property to him he could not be considered as a tenant.'* Now after the lapse of a hundred years, it has become clear that the view of Lord Abinger was right. The test of exclusive possession is by no means decisive."

I have emphasised the relevant statement of Lord Abinger in the above passage to point out that the defendant's father's legal position under the agreement of 1958, even if that agreement is to be treated as a valid contract for the sale of the land to him, cannot be treated as that of a tenant, so that even after that agreement he continued to be a contractual licensee up to the date of his death in 1962.

Assuming that the respondent's father acquired some sort of equity under that agreement, the appellant as a purchaser without notice of that equity is not bound by it. It was contended by counsel for the respondent that the fact that the respondent's father was paying rent first to Maros and later to Ahmad was known to the plaintiff. But the payment of rent was clearly in respect of the contractual licence which created no equity in favour of the respondent through his father. In my judgment the contractual licence came to an end with the respondent's father's death. But all that does not alter the fact that the plaintiff had no knowledge whatsoever of the agreement of 1958 under which the defendant claims to have an equitable right to the land. I think the learned President was right in saying that the agreement, being a conditional agreement, was not capable of specific performance. In the circumstances, I do not see how the agreement could lead the respondent's father to believe that he had an absolute estate in the property.

Quite apart from the notice of May 15, 1965, the notice which the plaintiff gave to the defendant on August 22, 1973 was sufficient to put an end to the contractual licence which was the only basis on which the respondent could claim a right to remain on the land. Assuming that the licence was revoked in breach of contract, the revocation itself was valid notwithstanding the defendant's right to some sort of damages, as any contract under the licence may be said to have been granted was not a specifically enforceable contract. The result was that the respondent by refusing to leave within a reasonable time became a trespasser.

The only other point raised on behalf of the respondent is that, assuming that he has no right to remain on the land, he is entitled to compensation under section 28(2) of the Civil Law Ordinance, 1956 which reads as follows:

"If any person erects any building or makes an improvement upon any lands held by him *bona fide* in the belief that he had an estate in fee simple or other absolute estate, and such person, his executor or assign, or his under-tenant is evicted from such lands by any person having a better title, the person who erected the building or made the improvement, his executor or assign shall be entitled either to have the value of the building or improvement so erected or made during such holding and in such belief estimated and paid or secured to him or at the option of the person causing the eviction to purchase the interest of such person in the lands at the value thereof irrespective of the value of such building or improvement."

This question was not raised in the court below. In any event, I do not see how it can possibly be argued that when erecting the building on the land the respondent's father had *bona fide* belief that he had an estate in fee simple or other absolute estate in the land, so that the defendant himself cannot possibly claim to have any such *bona fide* belief.

In *Ramsden* v. *Dyson*[1] the Lord Chancellor (Lord Cranworth) said at pages 140 and 141: —

"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end."

Assuming that the defendant is entitled to compensation, what should be the amount of such compensation? The defendant stated in evidence that on moving into the house he had it renovated and did

minor repairs to it which cost him $6,000. He produced no other evidence to support this assertion. The plaintiff's evidence was that when she first saw the house it had zinc roof and plank walls and that apart from minor repairs the structure remained the same. The defendant has lived in the house since 1962. Since 1965, that is for more than 11 years now, he has not paid any ground rent or assessment. This works out at a total of more than $3,500. I do not think the house itself together with minor repairs would have cost the defendant or his father anything more than that. I believe the ends of justice will be met if he is not required to pay arrears of ground rent and assessment and not awarded any compensation, but I think he must be given a bit of time to give up vacant possession.

In the result I would allow this appeal, setting aside the order of the court below and restoring the judgment of the learned President, Sessions Court as regards delivery of vacant possession by the defendant but there will be no order for damages for unlawful occupation. The defendant must quit and deliver vacant possession on or before February 28, 1977. He must also pay the costs of this appeal and the costs in the courts below.

Ali and **Wan Suleiman F.JJ.** concurred.

Appeal allowed.

Solicitors: *D.P. Vijendran & Zulkifli; R.R. Chelliah Bros.*

SHANMUGAM v. PITCHAMANY & ANOR.

[O.C.J. (Hashim Yeop A. Sani J.) January 23, 1976]
[Ipoh — Divorce Petition No. 13 of 1972]

Family law — Divorce — Adultery — Quantum of proof — Custody of children.

Practice and Procedure — Part-heard case — Death of judge who heard the case — Whether case can be continued before different judge.

In this case the divorce petition had been heard by the late Mr. Justice Sharma, and had been adjourned. When the case came up for continuation, counsel for the parties applied for the case to be continued and not heard *de novo*. The application was agreed to subject to full liberty to the parties to recall and re-examine any witness as they may wish to do. The ground on which the divorce petition was based in this case was adultery.

Held: (1) the allegation of adultery has to be proved to the satisfaction of the court beyond reasonable doubt. In this case the evidence adduced by the petitioner had sufficiently established by necessary inference that adultery must have been committed and therefore a decree nisi should be granted;

(2) in the circumstances of this case custody of all the children except the eldest aged 15, should be given to the petitioner, with unrestricted right of access by the respondent;

(3) as it appeared that the eldest child had been with the respondent all along, the custody of the eldest child should continue to remain with the respondent.

Cases referred to:—

(1) *In Re Application of British Reinforced Concrete Engineering Co. Limited* 45 T.L.R. 186.

(2) *Coleshill* v. *Manchester Corporation* 44 T.L.R. 258; [1928] 1 K.B. 776, 786.

(3) *Bastable* v. *Bastable* [1968] 1 W.L.R. 1684, 1687 C.A.

(4) *Farnham* v. *Farnham* (1925) 133 L.T. 320.

DIVORCE PETITION.

S. Jegathesan for the petitioner.

S.A. Lingam for the respondent and the co-respondent.

Hashim Yeop A. Sani J.: This divorce petition was first heard by the late Justice N. Sharma on November 20, 1973 and continued on April 11, 1974. During the two days of hearing five witnesses were heard, four of whom were on behalf of the petitioner and the last witness heard was the respondent. The only witness left unheard when this case came up for continuation on December 9, 1975, was the co-respondent. When the case came up for continuation before me on December 9, 1975, both counsel for the petitioner and counsel for the respondent and co-respondent applied to the court that the case be continued and not heard *de novo* on the grounds that all the witnesses except one had already been heard. I agreed to the application subject to full liberty to both counsel to recall and to re-examine any witness as they might wish and to resubmit on any point. I bore in mind the case *In Re Application of British Reinforced Concrete Engineering Co., Limited*(1) where it was held that where during proceedings without a jury, after some of the witnesses have been called, the presiding judge dies, another judge, if there is no conflict of evidence, may at the request of the parties preside at the continuation of the hearing, after reading the shorthand notes of the evidence, and need not have the witnesses recalled. In that case Mr. Justice MacKinnon adopted the same procedure. The dictum of Lord Justice Scrutton in *Coleshill* v. *Manchester Corporation*(2) was also explained in that case as a dictum directed to a case heard before a judge and jury where there was a conflict of evidence. In the latter case Scrutton L.J. commented on the procedure adopted in a case which had been partly heard before Mr. Justice Fraser at the time of that judge's death: "I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in court in the course of the trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner."

During the continued hearing on December 9 and 10, 1975, PW1 (the petitioner), PW3, PW4, and RW1 (the respondent) were recalled and re-examined before the co-respondent was called to give evidence.

The undisputed facts are that the petitioner and the respondent were married on May 22, 1959, under the Civil Marriage Ordinance, 1952. The petitioner was then 18 years old and the respondent was 16 years old. At the time of the hearing the petitioner was the Headmaster of a Tamil School, and the respondent was a housewife. Their matrimonial home was No. 349, Jalan Aman Shah, Selama, Perak. There were 5 children from the marriage aged 15, 14, 12, 11 and 9 years respectively. At the time of the incident on December 6, 1971 (which precipitated the present petition) the co-respondent and another person (PW4) were lodgers at the matrimonial home.

The story of the petitioner can be summarised briefly as follows. On December 6, 1971, at about